

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)	
)	
Modifying the Commission's Process to Avert)	
Harm to U.S. Competition and U.S. Customers)	IB Docket No. 05-254
Caused by Anticompetitive Conduct)	

To: The Commission

**REPLY COMMENTS OF THE
CARIBBEAN ASSOCIATION OF NATIONAL
TELECOMMUNICATIONS ORGANIZATIONS ("CANTO")**

Introduction

The Caribbean Association of National Telecommunications Organizations ("CANTO") hereby submits this reply to the comments filed in response to the *Notice of Inquiry* ("NOI") in the above-referenced docket.¹ As an initial matter, CANTO points out that the majority of commenters do not support the proposals raised in the NOI or believe that additional regulations aimed at foreign carrier whipsawing were needed. As CANTO noted in its comments, in the NOI the Commission cited only four instances of possible anti-competitive activity by foreign carriers relating to the settlement of international traffic. Moreover, significant changes in the market have made it much more difficult for foreign carriers to engage in such conduct. As MCI stated, technological and market developments over the past few years have created a dramatically different competitive landscape for the termination of international traffic.² The

¹ *Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct*, IB Docket No. 05-254, Notice of Inquiry, FCC 05-152 (rel. Aug. 15, 2005) ("NOI").

² MCI Comments at 2; CANTO Comments at 2.

Commission should therefore proceed cautiously in this much more complex environment, and should not attempt to rely on this proceeding to develop any final conclusions regarding new procedures to address complaints of foreign carrier whipsawing.^{3/}

I. No New Commission Procedures Are Needed to Combat Foreign Carrier Whipsawing

CANTO agrees with commenters who urge the Commission to move cautiously with regard to the imposition of new rules or procedures regarding whipsawing.^{4/} The four isolated incidents of alleged anti-competitive behavior cited in the *NOI* are not enough to justify unprecedented new procedures that would go beyond “leveling the playing field” and provide U.S. carriers with a powerful offensive tool to increase their negotiating leverage over foreign carriers. Rather than the type of unilateral action contemplated in the *NOI*, most commenters agree that government-to-government discussions are the preferred response to concerns of anticompetitive behavior.^{5/} As AT&T explained, it is important that “the Commission should ... continue its well-established practice, when it is informed that a foreign carrier has threatened to block services, of intervening through direct contacts and correspondence with foreign regulators

^{3/} MCI Comments at 14.

^{4/} See, e.g., Comments of Cable & Wireless Jamaica (“C&W Jamaica”) at 1; Comments of Digicel USA and Mossel (Jamaica) Ltd. at ¶¶ 3.7, 4.2; Comments of the Jamaica Ministry of Commerce, Science & Technology (“Jamaican Government”) at 4-6; Comments of Malaysian Communications and Multimedia Commission at ¶ 2.3; CANTO Comments at 2. Cf. Reply Comments of the Delegation of the European Commission, filed in IB Docket No. 02-234 (Feb. 14, 2003) at 2 (expressing “firm opposition” to FCC unilateral action regarding settlement rates) (“EU Foreign Mobile Termination Comments”).

^{5/} See C&W Jamaica Comments at 9; Comments of Digicel USA and Mossel (Jamaica) Ltd. at ¶ 3.7; Jamaican Government Comments at ¶ 14; CANTO Comments at 3 (citing EU Foreign Mobile Termination Comments at 1 (“pro-competitive regulation of telecommunications services in third markets must be achieved not by unilateral action but by negotiations between countries, primarily in the multilateral framework of the WTO, and by a policy of assistance toward other countries to reform their telecommunications regulatory environment as exemplified by the international co-operation that takes place in the ITU”).

and foreign carriers”^{6/} Moreover, such an approach is consistent with the Commission’s previously-stated intent that, “because each controversy presents somewhat different circumstances, our first response to allegations of anticompetitive conduct in commercial disputes will be to consult with foreign regulators in coordination with appropriate Executive Branch agencies.”^{7/}

II. If New Whipsawing Procedures Are Adopted, They Must Be Transparent, Fair and Impartial

Without regard to the complexities of the “different circumstances” present in each case, a few commenters suggest that the Commission adopt an automatic, knee-jerk reaction to each complaint by immediately taking action against the foreign carrier. Most disturbingly, these commenters suggest that the Commission take action without any notice to the foreign carrier and without any opportunity to comment. Sprint proposes that the Commission take action using the standards established by the courts for granting injunctions.^{8/} However, Sprint ignores the fact that in court proceedings, the party which is the target of the injunction motion typically has the ability to respond to the injunction motion.^{9/}

If the Commission’s regulatory actions are to be regarded as legitimate and respected internationally, the process it uses must afford sufficient transparency and meaningful opportunity for participation by affected parties. Adopting a “shoot first and ask questions later”

^{6/} AT&T Comments at 12. This contact should come before the availability of any interim relief. *Id*

^{7/} *International Settlements Policy Reform*, IB Docket Nos. 02-324 and 96-21, First Report and Order, FCC 04-53 (rel. Mar. 30, 2004) at ¶ 46.

^{8/} Comments of Sprint Nextel Corp. (“Sprint”) at 3.

^{9/} CANTO queries whether Sprint would support a requirement that the complaining carrier post an injunction bond – a common tool used by courts when granting injunctions to ensure that the moving party will be able to compensate the enjoined party if it is later determined that the injunction was not justified.

policy, as C&W Jamaica aptly describes it, would not achieve this goal.^{10/} In an age of electronic communications, there is little justification for not serving the foreign carrier – notice by e-mail could be achieved virtually effortlessly, especially when the complaint itself is being submitted electronically to the Commission. In fact, in situations where the foreign carrier is threatening circuit disruptions without legitimate justification, the mere notice to the carrier of the filing of the complaint potentially could be enough to convince it to withdraw its threat, thereby resolving the conflict without the need for actual Commission intervention. The only possible rationale for *not* serving the foreign carrier would be to deny the foreign carrier an opportunity to respond to the allegations against it – surely not a legitimate Commission objective.^{11/} To keep the foreign carrier in the dark even further, some commenters suggest that the complaints filed by U.S. carriers should be kept confidential, such that the foreign carrier will not even know the details of the allegations being made against it. The regime envisioned by these commenters offends all notions of fair play and should be rejected.

Similarly, the expedited comment period described in the *NOI* would make meaningful participation in whipsawing proceedings by foreign carriers less likely. The current comment cycle is already an expedited process; a further shortening, especially if combined with a lack of notice, would most likely ensure that the views of foreign carriers are excluded from the Commission’s decision-making process.^{12/}

^{10/} C&W Jamaica Comments at 9 (calling for the Commission to establish procedures that are “within reasonable standards of natural justice”).

^{11/} Even in previous situations where the Commission determined that a foreign carrier had no legal right to notice prior to Commission action, the Commission nevertheless provided notice. *See, e.g., AT&T Corp.*, Order on Review, 14 FCC Rcd 8306 (1999) at ¶24 (noting letter sent to Argentine carrier).

^{12/} *See* Comments of C&W Jamaica at 9 (proposed shorter comment cycle would fail to “tak[e] into account the longer lead times that foreign carriers may require to learn about Commission proceedings and to arrange for fully-informed participation”).

Commenters who expressed support for immediate Commission action upon the filing of a complaint are, in effect, seeking an explicit presumption in favor of the U.S. carrier's version of the facts in every whipsawing dispute.^{13/} Such a presumption – especially without an opportunity for rebuttal until after sanctions are imposed – can hardly be described as representing “impartiality” to all market participants, which is required by the WTO Reference Paper.^{14/} It is critically important for the Commission to have a clear view of the facts in these cases, if the Commission is to make an impartial determination as to whether there has been intentional circuit disruptions, or “threat” of the same, combined with “demands” for rate increases that are “non-negotiable.”^{15/} Sprint argues that Commission action in response to a complaint should be “self evident” if the facts are not in debate.^{16/} However, without a fair opportunity to comment by the foreign carrier, the facts will never be “in debate.” Moreover, even if there is an actual demand for higher rates, there are legitimate reasons (noted below) why foreign carriers may need to increase their rates, and why they have a right to protect themselves by discontinuing service if they cannot otherwise operate profitably or comply with local law. Even MCI recognizes that there are circumstances, including those based on a carrier's contractual rights, where it is appropriate for a carrier to refuse or limit traffic terminations.^{17/}

^{13/} See, e.g., Sprint Comments at 5 (calling for action on an “immediate, *ex parte* basis”). As C&W Jamaica notes, Commission actions taken on an *ex parte* basis run the risk of being based “on a flawed portrayal of what has occurred in the foreign country.” C&W Jamaica Comments at 9. See also Jamaican Government Comments at 7 (“[T]o assume the U.S. carrier is always right and deserving of protection will ultimately harm the U.S. consumer”).

^{14/} See CANTO Comments at 10 (*citing* WTO Negotiating Group on Basic Telecommunications, Reference Paper (Apr. 30, 1996), 36 I.L.M 367 (1997), at § 5).

^{15/} See, e.g., Sprint Comments at 3-4.

^{16/} Sprint Comments at 3.

^{17/} MCI Comments at 8. See also Comments of Reliant Enterprise Communications Ltd. and the Jamaican Competitive Telecommunications Association (“JCTA/Reliant”) at 2. JCTA/Reliant state that the only acceptable reason for network blockage is for non-payment of

Finally, CANTO does not agree with the notion that interim measures can be imposed on foreign carriers without any long-term consequences on the foreign carriers if they are later “cleared” of anticompetitive behavior allegations.^{18/} Lengthy delays in receiving all payments from U.S. carriers could put foreign carriers out of business. In addition, the mere availability to U.S. carriers of virtually “on-demand” FCC action to limit or cut-off all U.S. payments to foreign carriers could result in U.S carriers having a clear (and unfair) upper-hand in negotiating international call termination rate agreements.

III. The Commission’s Policies Should Be Guided By Notions of International Comity

To the extent foreign carriers seek higher termination rates due to mandates required by their national governments (such as universal service collections), the Commission should, as a matter of international comity, not attempt to coerce these carriers into disobeying the local laws to which they are subject.^{19/} The Commission has previously recognized the importance of international comity considerations, explaining that “the doctrine of comity reflects the broad concept of respect among sovereign nations, and is useful in determining ‘the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.’”^{20/}

Comity is also relevant where a foreign regulator is better equipped than the Commission to intervene in a dispute over call termination rates. In *Centennial Communications*, the

services. If U.S. carriers do not agree to pay the full invoice for services rendered at justified rates, then presumably JCTA/Reliant would agree that discontinuation of service is justified.

^{18/} MCI Comments at n.28; Sprint Comments at 4; JCTA/Reliant at 4.

^{19/} As stated previously, if the Commission disagrees with the foreign government’s policy, it should seek any desired change through bi-lateral or multi-lateral negotiations with that government.

^{20/} *VIA USA, Ltd. Telegroup, Inc.*, Order on Reconsideration, 10 FCC Rcd 9540, 9555-9557 (1995) (invoking comity and adopting policies to assist in the effective enforcement of foreign laws and regulations regarding international call-back services).

Commission, citing comity considerations, declined jurisdiction over complaints filed with the Commission alleging anti-competitive activity by the Dominican carrier Tricom with regard to international call termination rates, terms and conditions.^{21/} The complainants alleged, *inter alia*, that Tricom denied interconnection capacity to the complainants and sought an excessive call termination rate that was not cost-justified. The Commission determined that the Dominican regulator, INDOTEL, was “better-equipped to handle this dispute.”^{22/}

As CANTO stressed in its initial comments, determining whether a particular termination rate is appropriately cost-justified is almost always within the exclusive expertise of the national regulator.^{23/} As the Jamaican Government indicated, the Commission has previously failed to recognize the higher costs, based on “peculiar geographic, climatic, socio-economic and developmental limitations,” faced by carriers in countries such as those in the Caribbean.^{24/} CANTO also noted the often higher and more volatile costs present in developing countries, including those associated with capital, labor, political risk, exchange rate, insurance and network expansion. In addition, these countries also experience higher costs due to greater rates of fraud and lower collection rates. Thus, where appropriate, the Commission should defer to the expertise of national regulators rather than intervening in disputes over the legitimacy of local termination rates being proposed by the foreign carrier.

^{21/} *Centennial Communications Corp. et al.*, Memorandum Opinion and Order, 17 FCC Rcd 10794 (2002).

^{22/} *Id.* at 10804.

^{23/} CANTO Comments at 8.

^{24/} Jamaican Government Comments at 8.

IV. CANTO Agrees with Other Commenters that Reinstitution of the ISP and Stop Payment Orders Would Be Counterproductive

CANTO agrees with Sprint and AT&T that a return to the International Settlements Policy (“ISP”) is not appropriate,^{25/} and with MCI that stop-payment orders are not needed.^{26/} Both would be counterproductive. The ISP requires reciprocal traffic and symmetrical rates which would complicate rather than solve any disagreement over the appropriate cost for foreign call terminations. Stop-payment orders would cut off some or all of the revenue to the foreign carrier, thereby giving it even *more* reason than before to discontinue service.^{27/}

CONCLUSION

No carrier desires to discontinue service and forgo the profitable revenues associated with such service. It is therefore perhaps not surprising that the *NOI* cites to only four examples of alleged anticompetitive behavior involving foreign carriers that discontinued service (or threatened to). In at least one case – Jamaica – the foreign carriers were acting in response to local government mandates. In view of the limited situations where allegations of anti-competitive activity have been reported, CANTO believes that no changes in Commission policies or procedures are needed.

In fact, CANTO agrees with an argument advanced by the Commission in its brief before the D.C. Circuit on the appeal of its order establishing international benchmark rates. As C&W Jamaica noted, the Commission argued that if its benchmark limits were not acceptable to a

^{25/} Sprint Comments at 6; AT&T Comments at 19.

^{26/} MCI Comments at 13.

^{27/} As MCI notes, stop payments may also be ineffective because the traffic can find other routes, unaffected by the stop payment orders, to its destination. *Id.*

foreign carrier, the carrier could simply decline to accept calls from the U.S. altogether.^{28/} Similarly, U.S. carriers are not required to pay any foreign carrier's requested termination rate; they can choose instead not to send traffic to that foreign carrier. The Commission's argument also indicates that foreign carriers are under no obligation to terminate traffic from a U.S. carrier; logic dictates then that the foreign carrier could discontinue service at any time, subject to its contractual obligations.

If the Commission nevertheless does decide to move forward (in a later proceeding) with proposed new rules, the Commission should, as MCI noted, proceed cautiously in regulating what is a radically different market for foreign traffic termination than it was even a few years ago.^{29/} Above all, the Commission must ensure that its unilateral actions are at least based on upon a fair, impartial and transparent process that will be respected by the international community.

Respectfully Submitted,

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^{28/} C&W Jamaica Comments at 14 (*citing Cable & Wireless plc v. FCC*, No. 97-1612, Brief for Respondents at 27 (May 6, 1998)).

^{29/} MCI Comments at 2.